REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

CIVIL CASE NO. 103 OF 2004

EDWARD WANYONYI MASIBILI.....PLAINTIFF

VERSUS

BENARD MUNIALO MANYONGE.....1ST DEFENDANT

DAVID MANYONGE MUNIALO.....2ND DEFENDANT

R U L I N G

The dispute herein relates to the land parcel **NO NDIVISI/MUCHI/992** (the suit land).

By his plaint dated 3rd September 2004 and filed herein on 13th September 2004, **EDWARD WANYONYI MASIBILI** (the plaintiff) filed this suit against **BENARD MUNIALO MANYONGE** (the 1st defendant) and **DAVID MANYONGE MUNIALO** (the 2nd defendant) claiming that the registration of the suit land in the names of the 1st defendant and the subsequent transfer thereof to the 2nd defendant was fraudulent. He therefore sought Judgment against the defendants in the following terms: -

> ***"The plaintiff's claim against the defendants therefore is for a declaration order to the effect that the 1st and 2nd defendants were registered as proprietors of land parcel NO NDIVISI/MUCHI/992 to hold the same in trust for the plaintiff in respect of 6 acres of which they are in actual use and occupation and for an order directing the 2nd defendant to transfer the said 6 acres to the plaintiff as the personal and legal representative of the Estate of the late DANIEL WAMASIBIRI CHEBUKOSI."***

The plaintiff later suffered a stroke and was substituted with his brother **DICK SIMIYU MASABILI** and the plaint was amended accordingly.

The defendants filed a defence dated 16th November 2004 in which they denied that they hold the suit land in trust for the plaintiff or that the plaintiff is entitled to 6 acres thereof. However, on 20th May 2014, **OMOLLO J** issued directions which the defendants failed to comply with and on 30th November 2015, their defence was struck out and in a Judgment delivered on 29th November 2016, the late **MUKUNYA J** allowed the plaintiff's claim as prayed together with costs.

The record shows that on 13th December 2016 the defendants filed a Notice of Appeal against that Judgment. It is not clear if that appeal was pursued.

The defendants first filed a Notice of Motion dated 18th June 2018 seeking to review and/or set aside the Judgment delivered on 29th November 2016 but that application was struck out with costs on 1st October 2018.

I now have before me the defendant's Notice of Motion dated 20th November 2018 seeking the following prayers: -

> **(a) Spent**
>
> **(b) That leave be granted to the firm of J. W. SICHANGI & CO ADVOCATES to come on record in place of KRAIDO & CO ADVOCATES for the defendants/Applicants.**
>
> **(c) That it pleased the Honourable Court to vary and/or set aside the ex – parte Judgment herein dated 29/11/2016 and the defendants/Applicants be granted leave to file defence and statements as required.**

The application is based on the grounds set out therein and supported by the affidavit of the 1st defendant. The gist of the application is that

since Judgment has already been entered, leave is necessary for the firm of **J. W. SICHANGI & CO ADVOCATES** to come on record for the defendants.

Further, that there is sufficient error apparent on the face of the record to warrant a review of the decree herein since the same was made without disclosure of another decree that had quashed the proceedings of the Land Disputes Tribunal that had awarded 6 acres of land to the plaintiff's deceased father. That the proceedings of the **WEBUYE LAND DISPUTES TRIBUNAL** were statute barred and a nullity which could not be relied upon in the Judgment sought to be reviewed and/or set aside. That although the plaintiff was aware about the decision of the **WEBUYE LAND DISPUTES TRIBUNAL** being quashed by **MUCHEMI J** in **BUNGOMA HIGH COURT MISC APPLICATION NO 2 OF 2003**, he proceeded to file this suit seeking a declaration that the defendants' hold 6 acres out of the suit land for him as ordered by the **WEBUYE LAND DISPUTES TRIBUNAL** and that this Court up – held that decision in the said Judgment delivered on 29th November 2016. That the defendants did not deliberately fail to honour the Court's order as this was not brought to his attention by his then advocate **MR KRAIDO** who had closed his office in **BUNGOMA** and moved to **KITALE** and it was only after the defendants perused the Court record that they discovered that their defence had been struck out. That the defendants never sold or leased the land to the plaintiff nor even dealt with him or his deceased father. The 1st defendant goes on to aver that he has sub – divided the suit land which is registered in his names into 10 parcels being **NDIVISI/MUCHI/9669, 9670, 9671, 9672, 9673, 9674, 9675, 9676, 9677** and **9678** some of which he has already sold. That the plaintiff has connived with the Registrar and fraudulently registered himself as the proprietor of parcel **NO NDIVISI/MUCHI/1970** (it is actually **NDIVISI MUCHI/9670** as per the copy of title deed which is the 1st defendant's annexture **DMM – 6**). That the 1st defendant has never taken the plaintiff to any Land Control Board nor signed any transfer forms at the Lands Office and there is also pending at the **WEBUYE SENIOR PRINCIPAL MAGISTRATE'S COURT LAND CASE NO 9 OF 2018** seeking eviction orders against him which suit should be withdrawn and transferred to this Court so that all issues can be addressed in a final Judgment.

The application is opposed and the plaintiff by his replying affidavit dated 21st January 2019 has averred, inter alia, that the application is not only incompetent but bad in law and an abuse of the Court process. That after he filed this suit, the defendants filed a defence and were ordered to comply by filing witness statements and documents which they failed to do and so their defence was struck out on 30th November 2015. That when the orders to comply were issued on 20th May 2014, both the defendants and their counsel were present. That when the case came up for hearing on 27th June 2016, the defendants and their counsel were served but the case could not proceed as the trial Judge was engaged in a Court Users Committee Meeting and the case was by consent adjourned to 1st September 2016 but on that date, neither the defendants nor their counsel attended and the case was heard and Judgment was delivered on 29th November 2016 with Notice to the defendants. That the defendants filed a Notice of Appeal on 13th December 2016. That a decree was subsequently drawn and approved by the defendants' counsel and it is preposterous for the defendants to allege that their counsel had closed his office when they were attending Court together with him. That there is no error on record and the purported sub – divisions of the suit land was cancelled ad reinstated to the original number **NDIVISI/MUCHI/992** before the Executive Officer executed all the relevant documents and the plaintiff was issued with his title for parcel **NO NDIVISI/MUCHI/9670**. That the plaintiff then sued the defendants in **WEBUYE MAGISTRATE'S COURT CASE NO 9 OF 2008** seeking their eviction. That this application has not met the threshold required to set aside or review the Judgment dated 29th November 2016 and is an abuse of the due process of this Court.

The application was canvassed by way of written submissions which have been filed both by **MR SICHANGI** instructed by **SICHANGI & COMPANY ADVOCATES** for the defendants and **MR MAKALI** instructed by the firm of **J. O. MAKALI & COMPANY ADVOCATES** for the plaintiff.

I have considered the application, the rival affidavits and annextures thereto as well as the submissions by counsel.

Prayer No. (b) which seeks leave to have the firm of **J. W. SICHANGI & CO ADVOCATES** come on record for the defendants in place of the firm of **KRAIDO & COMPANY ADVOCATES** was allowed by a consent order dated 20th November 2018.

Prayer No. (c) seeks orders that the Judgment dated 29th November 2016 be varied, reviewed and/or set aside and that the defendants be granted leave to file a defence and statements. I shall start by considering the application for review.

REVIEW OF JUDGMENT: -

The power to review a Judgment is provided for under **Order 45 Rule 1(1) of the Civil Procedure Rules** in the following terms: -

"Any person considering himself aggrieved –

(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) By a decree or order from which no appeal is hereby allowed, and who from discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the orders made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of Judgment to the Court which passed the decree or made the order without unreasonable delay." Emphasis added.

It is clear from the above that the remedy for review of a Judgment is only available in the following circumstances: -

1. Where there is discovery of new and important matter or evidence which, even after the exercise of due diligence, was not within the Applicant's knowledge nor could it be produced, or;

2. On account of some mistake or error apparent on the face of the record or;

3. For any other sufficient reason, and;

4. The application must be made without un – reasonable delay.

5. It is also crucial that the decree or order sought to be reviewed must be one *"from which no appeal has been preferred."*

In paragraph 5 of his replying affidavit, the plaintiff has averred that this application is incompetent and bad in law. That is quite true because from the record herein, the defendants filed a Notice of Appeal on 13th December 2016 following the Judgment delivered by **MUKUNYA J** on 29th November 2016 and therefore could not at the same time file an application for review under **Order 45 Rule 1(1) of the Civil Procedure Rules** which is not available to a person who has filed a Notice of Appeal. This was considered by the Court of Appeal in the case of **ROSE LWAKOSA .V. KEITH GOGO ASAVA C.A CIVIL APPEAL NO 48 OF 2014 KISUMU (2016 eKLR)** where it said: -

> ***"This Court has affirmed the provisions of Order 45 rule 1 in a number of it's decisions. In KISYA INVESTMENTS LIMITED .V. ATTORNEY GENERAL & ANOTHER 1995 eKLR the Court held that a party who has filed a Notice of Appeal cannot apply for review but if the application for review is filed first, the party I not prevented from filing an appeal subsequently even if a review is pending. It is trite law that an appeal is deemed to have been filed in this Court once a Notice of Appeal has been lodged.***
>
> ***That being the clear position in law, the appellant in her application before the High Court that sought a review of the Judgment was misconceived and bad in law."***

The application for review is clearly therefore incompetent and bad in law.

But that is not all. The defendants were obliged to file the application for review ***"without un-reasonable delay."*** The Judgment sought to be reviewed was delivered on 29th November 2016 and this application was filed on 20th November 2018 a delay of 2 years which is not only un-reasonable but has also not been explained. In arguing that the defendants are not guilty of laches, **MR SICHANGI** has referred me to the case of **ANERIKO M. SIMIYU .V. REDEMPTA SIMATI C.A CIVIL APPEAL NO 227 OF 2004** and submitted in paragraph IV as follows: -

> ***"My Lords, in the above case, JUSTICE SERGON reviewed the Judgment of then JUSTICE MBITO J. The Judgment of JUSTICE MBITO J was made in the year 2000. The review application and ruling reviewing the said Judgment was on 23rd May 2004. This was after four years."***

I have perused the Court of Appeal Judgment and what is clear is that the ruling by **SERGON J** allowing an application for review was infact delivered on 23rd July 2004, (not on 23rd May 2004 as submitted by counsel), following an application to review the orders issued by **MBITO J** on 13th December 2000 and 21st February 2001. However, I have perused the Judgment of the Court of Appeal and it is not indicated therein when the application for review was actually filed in the High Court. What is clear from the Judgment of the Court of Appeal is that the issue of un – reasonable delay was not addressed. That issue has however been addressed by superior Courts and in **FRANCIS ORIGO & ANOTHER .V. JACOB KUMALI MUNGALA C.A CIVIL APPEAL NO 149 OF 2001(2005 2 KLR 307)**, the Court of Appeal stated that: -

> ***"In an application for review, an applicant must show that there has been discovery of new and important matter or evidence which after due diligence was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason and most importantly, the applicant must make the application for review without un-reasonable delay."*** Emphasis added.

Of course whether or not a delay is un-reasonable will be determined by the particular circumstances of each case and no doubt the Court has the discretion in making that decision which must be based on sound reasons.

In **KENFREIGHT E.A LTD .V. STAR EAST AFRICA CO LTD 2002 2 K.L.R 783 ONYANGO OTIENO J** (as he then was) found a delay of three (3) months to be un-reasonable. In **EMAN KITHAKA .V. PETER KAMUNYA KERUGOYA ELC CASE NO 2 OF 2015 (2016 eKLR)**, I found that a delay of four (4) months was un-reasonable. In **JOHN AGINA .V. ABDULSWAMAND SHARIF ALWI C.A CIVIL APPEAL NO 83 OF 1992 1992 LL.R 5734 CAK** the Court of Appeal stated that: -

> ***"An un-explained delay of two years in making an application for review under order 44 Rule 1(now order 45 Rule 1) is not the type of sufficient reason that will earn sympathy from any Court."***

The record herein shows that when the Judgment sought to be reviewed was delivered by **MUKUNYA J** on 29th November 2016, the defendants were represented by **MR KWEYU** and although the 2nd defendant has averred in paragraph seven (7) of his supporting affidavit that he was not informed of any developments by his advocate then on record, he has not told this Court when he eventually knew about the Judgment. However, the fact is that his then advocate was present when the Judgment was delivered and therefore he must have informed the defendants about the contents of the said Judgment. In **SHIMMERS PLAZA LIMITED .V. NATIONAL BANK OF KENYA LIMITED 2015 eKLR**, the Court of Appeal was dealing with an application for contempt but what it said applies with equal force in a situation such as is obtaining in this case. It said: -

> ***"Would the knowledge of the Judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings? We hold the view that it does. This is more so in a case such as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence."***

Therefore, although the 2nd defendant alleges that he was not informed of any developments, he is silent as to when he eventually became aware about the Judgment and in the absence of any other evidence, this Court is satisfied that this application filed two (2) years after the Judgment sought to be reviewed is clearly not merited for reasons of unreasonable delay.

Finally, I do not see in the application any new and important matter or evidence or any mistake or error apparent on the face of the record nor any other sufficient reason to warrant a review of the Judgment herein. The bulk of his supporting affidavit is a regurgitation of matters relating to the suit land and which have always been within his knowledge. This is nothing new. He then assails the Judge for arriving at a decision without sufficient evidence when her avers in paragraph six (6) of his supporting affidavit as follows: -

> ***"That Judgment simply held that the Court has perused the documents, heard the witnesses, perused proceedings of the tribunal and was satisfied the case was proved and ordered me to transfer six acres to the plaintiff."***

If the Judge misconstrued the law or evidence in arriving at the decision that he made in the Judgment sought to be reviewed, that may be a good ground for appeal but cannot be a ground for review **– NATIONAL BANK OF KENYA LTD .V. NDUNGU NJAU C.A CIVIL APPEAL NO 211 OF 1996 (1996 KLR 469)**.

See also PANCRAS SWAI .V. KENYA BREWERIES LTD C.A CIVIL APPEAL NO 275 OF 2010 (2014 eKLR). I do not also see any other sufficient reason upon which an application for review can be sustained.

The application for review is clearly un–meritorious and must be dismissed.

SETTING ASIDE EX–PARTE JUDGMENT: -

The defendants also seek, as an alternative remedy, the setting aside of the ex – parte Judgment delivered on 29th November 2016 on the basis that he was condemned un-heard. This is what the 1st defendant has deponed in paragraph eight (8) of his supporting affidavit.

> ***8 "That I stand condemned unheard as I have never deliberately failed to honour a Court order or at all and I have always vehemently defended the Respondents efforts to fraudulently acquire my land."***

There is no doubt that this Court has a wide discretion to set aside an ex – parte Judgment the main concern being to do justice to the parties. That discretion is however not designed to assist a person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the cause of justice – **PATEL .V. E.A CARGO HANDLING SERVICES LTD 1974 E.A 75, MBOGO .V. SHAH 1968 E.A 93** and **PITHON MAINA .V. THUKU MUGIRA 1982 – 88 1 KLR 171** among others.

However, the Judgment dated 29th November 2016 cannot be described as an ex – parte Judgment and neither can the proceedings that culminated in that Judgment be deemed as having been ex – parte. The term **EX–PARTE** is defined in **BLACK'S LAW DICTIONARY 10TH EDITION** as follows: -

> ***"Done or made at the instance and for the benefit of one party only and without notice to, or argument by anyone having an adverse interest; of, relating to, or involving Court action taken or received by one party without notice to the other."***

In the same Dictionary, an **EX-PARTE PROCEEDING** is defined as: -

> ***"A proceeding in which not all parties are present or given an opportunity to be heard."***

There is no doubt that the defendants were duly served with summons and filed their defence. It is also clear from the record that on 30th November 2015, that defence was struck out for failure to comply with the Court's directions issued on 20th May 2014. In his replying affidavit, the plaintiff has averred in paragraph nine (9) that both defendants and their counsel were present when the orders of 20th May 2014 were issued. That has not been rebutted. Indeed, the record of that day shows that the defendants' counsel **MR KRAIDO** addressed the Court as follows on the issue of compliance: -

"We will comply before the hearing date."

On 30th November 2015 when the case came up for mention to confirm compliance, **MR KRAIDO** was absent and had also not complied and so the defence was struck out. No appeal was filed against that decision. It cannot therefore be argued that the defendants had no notice of the case facing them. In the circumstances, the Judgment of **MUKUNYA J** dated 30th November 2015 cannot be described as a default Judgment. It was a final Judgment given by the Court after the defendants, who had filed a defence, failed to comply with the directions of the Court. In such a scenario, the remedy of setting aside that Judgment is not available and an aggrieved party can only appeal or seek a review. However, as I have already found above, the window for the remedy of review has also already been shut. This is what the Court of Appeal said in the case of **KENYA POWER & LIGHTING COMPANY LTD .V. BENZENE HOLDINGS T/A WYCO PAINTS C.A CIVIL APPEAL NO 132 OF 2014 (2016 eKLR)**: -

> ***"Apart from the provisions of Order 10 Rule 11, Order 12 Rule 7 and Order 36 Rule 10 of the Civil Procedure Rules dealing with the setting aside of default Judgments, the Civil Procedure Rules does not have a provision for the setting aside of the final Judgment. A party aggrieved by a final Judgment can either move the Court under Order 45 for a review of the resultant decree or by lodging an appeal in terms of Order 42."***

Unfortunately for the defendants, they have now arrived at a cul – de – sac.

It must also be borne in mind that when **OMOLLO J** made the directions dated 20th May 2014, the Judge was exercising the powers conferred by **Order 11 of the Civil Procedure Rules** which are meant, inter alia, to facilitate the expeditious disposal of suits. Such powers also include, under **Order 11 Rule 3(2)(o)(1)**: -

"Striking out the action or defence."

Section 1A (3) of the Civil procedure Act also places on the parties the following duty: -

> ***"A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court."*** Emphasis added.

It has been averred, without rebuttal, that both the defendants and their counsel were in Court when **OMOLLO J** made the orders dated 20th May 2014 and counsel even undertook to comply with the directions issued. A party that fails to comply with the directions of the Court and offers no explanation for that default cannot benefit from the exercise of the Court's discretion in his favour and especially when the Court's intervention is being sought after a long and un – explained delay.

A party seeking the Court's discretion must also do so with clear hands because setting aside a Judgment is an equitable remedy. Equity not only frowns on the indolent but he who comes to equity must do so with clear hands. In paragraph seven (7) of his supporting affidavit, the 2nd defendant appears to suggest that having lost touch with his then advocate, he only learnt about the striking out of his defence and the subsequent Judgment when he perused the Court file. This is what he says:-

> ***7: "That I was not informed of any developments by my advocate then on record MR KRAIDO who closed his office in Bungoma and moved to Kitale but upon perusal of the records I found my defence was struck out for non compliance."***

MR KRAIDO may have closed his Bungoma office and moved to Kitale. Indeed, the Notice of Appeal that he filed on behalf of the defendants on 13th December 2016 shows his address of service as **VICTOR HOUSE 1ST FLOOR KITALE**. It cannot however be correct for the defendants to claim that they were not in touch with their counsel because how else could he have filed the Notice of Appeal without their instructions? Clearly, the defendants are not being candid with this Court and are not deserving of the orders to set aside and/or review the Judgment dated 29th November 2016.

The up – shot of the above is that save for prayer No (b), the defendants' Notice of Motion dated 20th November 2018 is devoid of any merit. It is accordingly dismissed with costs.

Boaz N. Olao.

J U D G E

14th November 2019.

Ruling dated, delivered and signed in Open Court this 14th day of November 2019 at Bungoma.

Mr Murunga for plaintiff present

Mr Kweyu for Mr Sichangi for defendant present

Plaintiff present

Defendant absent

Joy – Court Assistant

Boaz N. Olao.

J U D G E

14th November 2019.